Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden, *Petitioner*,

v.

BENJAMIN WAI SILVA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
ROBERT M. FOSTER
Supervising Deputy Attorney General
Counsel of Record
110 West A St., Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2284
Counsel for Petitioner

32pp

QUESTION PRESENTED

Are the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 applicable to death penalty cases pending in the federal district courts at the time of the new law was enacted?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

ARTHUR CALDERON, Warden, *Petitioner*,

v.

BENJAMIN WAI SILVA, *Respondent*.

Petitioner, Arthur Calderon, Warden, California State Prison at San Quentin, prays that a writ of certiorari be issued to review the order of the Court of Appeals for the Ninth Circuit issued on January 16, 1997, in this death penalty case.

OPINION OR JUDGMENT BELOW

The order of the Ninth Circuit Court of Appeals was issued on January 16, 1997. It is unreported. It is attached as Appendix A. The order refers to a prior order of the Ninth Circuit in another death penalty case, Jeffries v. Wood. That order was issued on December 20, 1996. It is reported at 103 F.3d 827.

The order of the federal district court that was the original source of this litigation was issued on June 24, 1996, is unreported. It is attached as Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1254(1) to review the interlocutory judgment of the Ninth Circuit holding that habeas corpus provisions of the Antiterrorism

and Effective Death Penalty Act of 1996 are not retroactive. This is an important, clear cut issue of law that is fundamental to the further review of the case and would otherwise qualify as the basis for certiorari. Estelle v. Gamble, 429 U.S. 97, 115, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); United States v. General Motors, 323 U.S. 373, 377, 65 S. Ct. 357, 89 L. Ed. 311 (1945). As such, this is an appropriate case for this Court to grant certiorari.

This petition is being filed within the ninety days of the order by the Court of Appeals for the Ninth Circuit.

CONSTITUTIONS, STATUTES OR REGULATIONS

The habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 are contained in 28 U.S.C. § 2244 et. seq. It is set out in its entirety as Appendix C.

STATEMENT OF THE CASE

In 1981, Benjamin Wai Silva kidnapped and then murdered Kevin Thorpe in a remote portion of Northern California. He was sentenced to death. That judgment was upheld by the California Supreme Court on June 9, 1988. People v. Silva, 45 Cal. 3d 604, 754 P.2d 1070 (1988). Silva's petitions for writ of certiorari have been repeatedly denied by this Court. Silva v. California, 494 U.S. 1039, 110 S. Ct. 1502, 108 L. Ed. 2d 637 (1990) and Silva v. California, 488 U.S. 1019, 109 S. Ct. 820, 102 L. Ed. 2d 809 (1989).

Silva filed a Petition for Writ of Habeas Corpus in the Federal District Court for the Central District of California. Following extensive briefing, that court had

ordered a limited evidentiary hearing. With the passage of the Antiterrorism and Effective Death Penalty Act of 1996, the court ruled that the Act was applicable to the case at bar, but that the Act did not alter the standards for an evidentiary hearing. Recognizing the critical nature of its rulings, the district court issued a stay and gave Petitioner permission to seek an interlocutory appeal to the Ninth Circuit Court of Appeals.

Petitioner filed the Petition for Permission to Appeal on July 24, 1996. On November 20, 1996, in the case of Jeffries v. Woods, the Ninth Circuit issued an order (without opinion) that it had determined that the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 did not apply to cases filed in the federal courts prior to the effective date of the Act, April 24, 1996. (App. B.)

On January 16, 1997, the Ninth Circuit issued an order denying the Petition for Permission to Appeal as moot because of the order in Jeffries v. Wood. (App. A.)

SUMMARY OF ARGUMENT

The habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 are retroactive and do apply to cases pending in the federal courts on the day the new legislation was signed into law and became effective. The Act does not alter the primary conduct obligations of the parties, it merely modifies the manner in which the federal courts will review certain habeas claims.

ARGUMENT

I.

THE PROVISIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ARE RETROACTIVE

Since the Ninth Circuit has merely issued an order setting forth its conclusion the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "the Act") are not retroactive, but has not issued an opinion explaining what reasoning lead to that conclusion, Petitioner is handicapped in his ability to attack the analysis of the Ninth Circuit. However, application of this Court's decisions on retroactivity show that under those standards, the Act does apply to cases pending in the federal courts at the time the Act became effective.

This Court recently provided important guidance on the general question of the application of new statutes to pending cases in Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Under Landgraf, this Court should consider, first, whether Congress has expressly prescribed the new statute's reach in pending cases. Id., at 273. In making this analysis in Landgraf this Court specifically declined to draw a negative inference on the question of retroactivity as to some parts of a new Act from the fact that Congress had explicitly spoken on the question of retroactivity as to other parts of the act. Id., at 259-62.

Congress has not explicitly spoken on the applicability or retroactivity question in the general class of habeas cases governed purely by chapter 153 of the Act. The question of the applicability of the new restrictions on

evidentiary hearings must be determined by this Court under other appropriate criteria.

Under Landgraf, it must be determined whether application of the statute to pending cases would be genuinely "retroactive" in a special sense of the word.

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law.

Landgraf, 511 U.S. at 269.

This Court should consider, for example, whether the statute deals primarily with the court's jurisdiction, procedures, or power to grant prospective relief; or whether, instead, it "impair[s] rights a party possessed when he acted, increase[d] a party's liability for past conduct, or impose[d] new duties with respect to transactions already completed." Id., at 280; Chenault v. U.S. Postal Service, 37 F.3d 535, 537 (9th Cir. 1994); see U.S. v. 403½ Skyline Dr., La Habra Heights, CA, 797 F. Supp. 796, 799 (C.D.Cal. 1992) (statutes merely affecting remedies apply to pending cases). In the former situation, the court should abide by the rule that it should "'apply the law in effect at the time it renders its decision'" -- that is, apply the intervening new statute immediately to the case at bar. Landgraf, 511 U.S. at 264. In the latter type situation, most often arising in the areas of "contractual or property rights" where actors rely on the predictability and stability of the law at the time of the transaction, the court should apply a presumption that the new law does not apply "retroactively" to alter the effect of the prior primary conduct of individuals in a new way. Id., at 271-3.

Here, new 28 United States Code section 2254(e) sets strict limitations on evidentiary hearings in determining whether the custodian should be ordered to release the prisoner from restraint. The restriction is, in

essence, a rule governing the federal court's jurisdiction, procedures, and power to grant prospective relief. As such, it "'speak[s] to the power of the court rather than to the rights or obligations of the parties,'" and regulates "secondary" rather than "primary" conduct, so its immediate application to the case at bar would not truly be "retroactive." Landgraf, 511 U.S. at 274 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." [Emphasis added].) It does not impair any "right" a habeas petitioner possessed when he "acted," increase his liability for his past conduct, or impose any new duties with respect to transactions already completed. Id., at 280; Chenault, 37 F.2d at 537. The new restriction on evidentiary hearings does not even purport to determine the legality or constitutionality of any act of the habeas petitioner or any of the events alleged as bases for relief in a habeas petition. It addresses simply the question of the process by which the federal court will entertain federal habeas corpus claims. Because habeas corpus cases are themselves collateral in nature, changes in the operation of the habeas statute do not operate in a genuinely "retroactive" way even when applied immediately to pending cases. See Landgraf, 511 U.S. at 274. As the Ninth Circuit has stated, "A statute is not retroactive merely because the facts upon which its subsequent application depends are drawn from a time antecedent to its effective date." Samaniego-Meraz v. I.N.S., 53 F.3d 254, 256 (9th Cir. 1995). While the habeas proceedings depend on the antecedent facts of the crime and the trial, the new legislation deals only with how a federal court will resolve the claims of error. This does not make the statute retroactive within the meaning of Landgraf.

Moreover, nothing in Landgraf indicates that the likelihood of different results would serve to disfavor "'apply[ing] the law in effect at the time [the court]

renders its decision.'" Landgraf, 511 U.S. at 264 ("We have regularly applied intervening statutes conferring or ousting jurisdiction."). However the effect of the limitation on evidentiary hearings reforms might be described, they do not upset legitimate reliance interests, change the legal effect of the primary conduct of individuals in their affairs, or divest people of vested rights. Instead, they govern the secondary conduct of courts on procedural questions affecting the availability of prospective relief. Whether such effects might be termed "far reaching," or whether the hearing procedures simply change a longstanding statutory procedure, is immaterial.

In describing the circumstances in which retroactive applications of intervening statutes is disfavored, Landgraf consistently emphasized the value of fostering confidence in laws upon which people rely, in their primary activity, to gauge the legal consequences of their actions, and the fairness concern implicated by the imposition of new burdens on private rights after the fact. Landgraf, 511 U.S. at 265-6. Landgraf launched its discussion on retroactivity by emphasizing that:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Id., at 265.

But Silva can hardly complain that he relied to his detriment on the then-prevailing scope of federal habeas review in deciding to kill Kevin Thorpe in 1981. And he can not complain that, in his primary conduct, he actually relied to his detriment in any other way with respect to old law changed by the new Act. To so argue would be to totally muddle the distinction between Silva's primary conduct at the time of the crime with his tactical

decisions made years later during the course of the litigation. The focus of Landgraf is on the primary conduct, not the legal maneuvering defending against charges based on that primary conduct.

The Ninth Circuit has graphically illustrated this point in U.S. ex. rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402 (9th Cir. 1995). In that case, the defendant was sued under the Federal False Claims Act. After the crime, but before the trial, the law was altered so as to limit the power of a federal court to hear certain types of claims. The Ninth Circuit rejected an assertion that the amendment could not be applied to the then-pending litigation stating the change did not alter General Dynamics' primary conduct. "The amendment simply did not alter GD's underlying obligation not to commit fraud upon the government." Id., at 1408. Similarly, the change in the law in the case at bar did not operate to alter Silva's underlying obligation to not murder Kevin Thorpe. Thus, the Act should be applied retrospectively.

Moreover, the Ninth Circuit's position amounts to a subtle attempt to hijack the state's preeminent reliance interests in the enforcement of criminal judgments rendered in accordance with "clearly established" federal law. A defendant should not be allowed to convert the pre-reform standards regarding evidentiary hearings into a "vested right" of his own. Silva had no "matured" or "unconditional" property right in statutory habeas procedures. See Campbell v. United States, 809 F.2d 563, 567 (9th Cir. 1987). Surely Congress did not pass the original Habeas Corpus Act as a private relief bill for Silva's personal benefit. Under the Ninth Circuit's view, in addition, it would seem that the Act can never be enforced against any person who committed any crime before the President signed the Act.

The foremost purpose of federal habeas corpus is not to vindicate the underlying constitutional claim, but simply to insure that state courts adhere to the

Constitution, not as it later might be applied, but only "as interpreted at the time of the proceedings." Saffle v. Parks, 494 U.S. 484, 488, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1989); see Kuhlmann v. Wilson, 477 U.S. 436, 447, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). Accordingly, under the Teague v. Lane doctrine, the federal courts may not retroactively upset the finality of state convictions by applying "new" rules not "clearly established" when the state court decided the case. Sawyer v. Smith, 497 U.S. 227, 236, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990); Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Indeed, the interest in protecting final state judgments is so elevated in importance that it operates as a one-way street, prohibiting the grant of habeas relief based on rules post-dating the finality of the state adjudication, but allowing the denial of a habeas claim based upon application of such a rule in the state's favor. Lockhart v. Fretwell, 506 U.S. 364, 372-3, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The new legislation codifies and extends the Teague protections of the state judgment, by requiring that a state judgment on the merits precludes relief unless it is shown to have been, in the context of the time and the evidence presented, contrary to "clearly established" federal law or an unreasonable application of that law.

Precisely because it focuses on the reasonableness of the state merits adjudication at the time, application of the new Act to defeat the claims in this case would vindicate rather than defeat the legitimate "notice," "reliance," and "expectations" interest implicated in the case at bar. In the unique context of federal habeas review of state judgments, then, immediate application of the 28 United States Code section 2254 deference standard would further, rather than frustrate, the principle that in other contexts might tend to militate against immediate application of a new statute to a pending case:

the "'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" Landgraf, 511 U.S. at 265. Any predisposition against genuine retroactive application of an act of Congress that might normally prevail would be misplaced with respect to a statute that further protects the finality of state criminal judgments from federal habeas review.

Therefore, the reform prohibiting discretionary evidentiary hearings in cases where a habeas petitioner has failed to develop the "factual basis" of his claims in state court would apply to the case at bar, notwithstanding the Ninth Circuit's retroactivity argument. The restriction on evidentiary hearings does not defeat any legitimate reliance interest of a habeas petitioner. It does not increase a habeas petitioner's liability for his prior primary conduct. It does not impose upon him new duties with respect to transactions already completed. It does not divest him of a "vested right." Nor does it even purport to govern Silva's or anybody's "primary" conduct. As the Ninth Circuit has noted, "a remedial statute, which relates to practice, procedure or remedies and does not affect a substantive or vested right, often is deemed *not* to have a retroactive effect." U.S. v. Bacon, 82 F.3d 822, 824 (9th Cir. 1996); emphasis in original.

The evidentiary-hearing restriction, instead, is a rule governing court procedures. It thus should apply immediately in a pending case. See Turner v. United States, 410 F.2d 837, 840-1 (5th Cir. 1969) (new draft law discontinuing appeal hearings for conscientious objector applies to pending cases); see also United States v. Haughton, 413 F.2d 736, 738 (9th Cir. 1969) ("Statutes effecting procedural changes, which do not otherwise alter substantive rights, generally are considered immediately applicable to pending cases."); Graham v. Solem, 728 F.2d 1533, 1536-1538 (8th Cir. 1984) (total exhaustion rule of Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d

379 (1982) applies retroactively); Bracco v. Reed, 540 F.2d 1019, 1020 (9th Cir. 1976) (Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) applies retroactively); Tisnado v. United States, 547 F.2d 452, 455 (9th Cir. 1976) (same). That an intervening statute affects prospective relief does not create a retroactivity problem. Landgraf, 511 U.S. at 268-9. Silva has not been deprived of his right to challenge his conviction by showing that he received the ineffective assistance of counsel. He may still make such a showing. All that has been changed are the methods by which a habeas petitioner must make his showing.

As this Court is aware, this issue has created a major split of opinion amongst the federal circuit courts. Compare Lindh v. Murphy, 96 F.3d 856, 861-877 (10th Cir. 1996), cert. granted 117 S. Ct. 726 (1997) and Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), cert. denied, 65USLW3598 (1997) with Boria v. Keane, 90 F.3d 36, 37-8 (2nd Cir. 1996) and Edens v. Hannigan, 87 F.3d 1109, 1111 n.1 (10th Cir. 1996). This Court should grant review to resolve this major split of opinion amongst the courts of appeal

Therefore, the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 do apply to Silva's case. The order of the Ninth Circuit in this case should be reversed.

II.

THIS IS AN APPROPRIATE CASE FOR THE COURT TO GRANT CERTIORARI

This case presents an issue that is clear cut, fundamental to the further conduct of the case and would otherwise qualify for a grant of certiorari. This Court should grant certiorari even though this case asks this Court to review an interlocutory order.

Petitioners recognize that this Court has held that:

> [T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Co. v. Jacksonville, T. & K. W. RY. Co., 148 U.S. 372, 384, 13 S. Ct. 758, 37 L. Ed. 486 (1893).

However, this Court has held that where there is an important, clear cut question of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status. Estelle v. Gamble, 429 U.S. 97, 115, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); United States v. General Motors Corp., 323 U.S. 373, 377, 65 S. Ct. 357, 89 L. Ed. 311 (1945).

This case meets every one of these tests. The retroactivity of the Antiterrorism Act of 1996 is a clear cut purely legal question. Resolution of the Ninth Circuit's decision will govern not only Silva's case but every other death penalty case pending in the Ninth Circuit. There can be little doubt that this issue is worthy of certiorari on

its own as this Court has granted review in a closely related question in Lindh.

Moreover, since the resolution of this question will impact every death penalty case pending in every federal court in this country at the time the new Act was signed, it is an important question in the administration of criminal justice worthy of a grant of certiorari even though it involves an interlocutory order. DiBella v. United States, 369 U.S. 121, 124, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962). The resolution of the question presented here will answer the most fundamental question involving every federal death penalty habeas corpus case -- what law applies?

Therefore, given the clear cut purely legal question presented in this case, given the huge impact this issue will have nationwide and since this Court has already recognized that the question presented is worthy of a grant of certiorari, this Court should grant certiorari in this case.

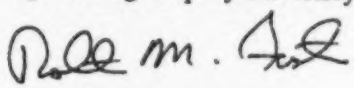
CONCLUSION

For the foregoing reasons, Petitioner respectfully submit that the Writ of Certiorari should issue to review the decision of the Court of Appeals for the Ninth Circuit in this case.

Dated: April 7, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General



ROBERT M. FOSTER
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

RMF:bjm
SD90XW0005

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No.

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OCTOBER TERM, 1996

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BENJAMIN WAI SILVA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
ROBERT M. FOSTER
Supervising Deputy Attorney General
Counsel of Record
110 West A St., Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2284
Counsel for Petitioner

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APPENDIX A

APPENDIX A

[Filed January 16, 1997]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN WAI SILVA,	No. 96-80269
Plaintiff-Respondent,	D.C. No. CV-90-03311-DT
v.	**ORDER**
ARTHUR CALDERON, Warden,	
Defendant-Petitioner.	

Before: REINRARDT, LEAVY and TASHIMA, Circuit Judges.

Because this court has held that the amendments to Chapter 153 of Title 28 of the United States Code contained in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996, see Jeffries v. Wood, 1996 WL 730493 (9th Cir. Nov. 20,

1996), the Petition for Permission to Appeal is dismissed as moot.

PETITION FOR PERMISSION T
APPEAL DISMISSED.

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APPENDIX B

APPENDIX B

[Filed June 24, 1996]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN WAI SILVA,	) Case No. CV 90-3311 DT
	)
Petitioner,	) **DEATH PENALTY**
	)
v.	) ORDER DENYING
	) RESPONDENT'S
ARTHUR CALDERON,	) MOTION TO VACATE
Warden of California	) THE COURT'S PRIOR
State Prison at San	) ORDER GRANTING AN
Quentin,	) EVIDENTIARY
	) HEARING
Respondent.	)
	)

Background

1. Factual Summary.

After a trial by jury, petitioner Benjamin Wai Silva ("Silva") was convicted of murdering Kevin Thorpe, but acquitted of murdering his traveling companion Laura Craig. The jury also found four special circumstances true, although three of these were later found inapplicable or unconstitutionally vague. After a

penalty phase trial, also to a jury, Silva was sentenced to death.

The essence of the charges were that Silva and two accomplices, Joe Shelton and Norman Thomas, kidnapped the couple after they were seen at a gas station filling up their car with gas. The next day, Silva and Shelton killed Thorpe while Thorpe was tied to a tree. The evidence describing how Thorpe was killed came through testimony by Thomas as to statements made by Shelton. Thomas testified that after Thorpe was killed, the threesome were standing over a barrel in which some of Thorpe's belongings were being burned. During that time, Shelton described the facts surrounding the actual killing while Silva simply looked on and smiled. Most of the testimony regarding the murder came from Thomas' retelling of this incident.

Shelton was tried before Silva, convicted of murdering both Thorpe and Craig, and, after a penalty trial, was sentenced to life in prison without possibility of parole. When called to testify at Silva's trial, Shelton

asserted his fifth amendment rights against self-incrimination. Although the trial judge ruled that Shelton's privilege no longer applied -- since he testified at this first trial and, in any event, had already been convicted -- the trial court declined to hold Shelton in contempt or invoke further punitive measures in light of Shelton's extant unparolable life sentence.

2. Procedural History.

Silva's conviction was affirmed by the California Supreme Court and, following two state habeas petitions and denial of certiorari review of the second petition, Silva filed a federal habeas corpus action in this Court in June 1990. As he had been throughout the state appellate proceedings, Silva was represented by Emery Allen, who had transferred to the State Public Defender's office during the litigation of Silva's second habeas petition. Following an answer and traverse, the pleadings were closed at the end of August 1990.

Soon thereafter, Silva requested discovery and an evidentiary hearing, both of which were denied after a

hearing in February 1991. Two months later, in April 1991, the Court issued a tentative opinion denying the writ. The parties filed briefs regarding the Court's tentative opinion and a hearing on the tentative opinion was scheduled for late May 1991.

Ten days before the scheduled hearing, the State Public Defender filed a motion to withdraw as counsel of record, claiming it had a conflict of interest in that it had previously represented Shelton during Shelton's appeal. The Court denied the motion to withdraw, denied reconsideration, and Silva petitioned the Ninth Circuit for a writ of mandamus. Two months later, in mid-July 1991, after appellate briefing on the issue, the Ninth Circuit issued the writ of mandamus directing this Court to allow the State Public Defender to withdraw.

New counsel for Silva was not located until May 1992, when Phil Trevino was appointed as counsel of record. At Trevino's request, Michael Brennan was appointed as second counsel on June 10, 1992.

In October 1992, new counsel Trevino and Brennan filed a request for investigative funds and a motion for discovery. The investigative funds application was denied and, after briefing and a hearing, the Court denied the requested discovery as well. In February 1993, new counsel filed a second amended petition for writ of habeas corpus. The second amended petition incorporated by reference the first amended petition and raised two new basic issues -- the constitutional vagueness of the California death penalty statute and a host of new allegations of ineffective assistance of trial counsel. The pleadings were closed by May 1993, but exhaustion questions were raised by the Attorney General and conceded by Silva. The Court authorized Silva to return to state court to exhaust the newly presented claims. The state court denied the third state habeas petition on the merits within a month and the pleadings on the previously-unexhausted claims were closed at the end of October 1993.

While the pleadings were still open, in September 1993, Silva filed a renewed request for an evidentiary hearing. The request incorporated by reference the evidentiary hearing request filed by prior counsel and addressed the new claims which Petitioner believed merited an evidentiary hearing. This request was denied by minute order on September 15.

At the beginning of November 1993, Silva filed an application to add one additional claim, Claim Y. The proposed amendment added a claim that was also currently pending before the United States Supreme Court and the amendment was unopposed by the Attorney General. The Court approved the proposed amendment a few days later.

The Court then scheduled this case for a hearing on the merits and performed additional research with regard to the new claims. After an informal conference, Silva's attorneys requested the opportunity to re-present their prior discovery and evidentiary hearing requests. This Court granted this request and on March 21, 1994

petitioner filed a supplemental memorandum of points and authorities in support of previously filed motions for discovery and an evidentiary hearing. An opposition was filed on April 15, 1994. On May 31, 1994 the Court granted a limited evidentiary hearing on Claims A, B, X (sub-paragraphs 1, 3, 10, 13, and 14) and X.6 and X.7 as they relate to Thomas's burglary charge, probationary status, and plea arrangements re psychiatric examination. The Court denied an evidentiary hearing as to all other claims, deferred ruling on Claim W, and denied Claim Y on the merits.

On November 30, 1995 this Court delineated the scope of discovery to be had in the case, allowing Attorney Thomas Buckwalter to be questioned on what steps he took to attack the competency or credibility of prosecution witness Norman Thomas. In the same order the Court denied Petitioner's renewed motion for the appointment of a Strickland expert.

On April 30, 1996 this Court, in accordance with a stipulation submitted by the parties, ordered that the

record be closed on the issues before the Court pursuant to the grant of the evidentiary hearing without the taking of any live testimony. The parties submitted various items and materials to be added to the record, and to be considered by the Court for the purposes of the evidentiary hearing.

Prior to the due date set for the briefing on the claims to be considered pursuant to the evidentiary hearing, the Attorney General filed its Position on Retroactivity of New Legislation and therein requested that this Court vacate its order granting an evidentiary hearing. An opposition was filed on May 23, 1996, and a reply was filed on June 4, 1996. This motion is presently before this Court.

Discussion

1. Pre-Act Standard Governing Motion for Evidentiary Hearing.

This Court granted an evidentiary hearing based upon the standards set forth in the relevant case law prior to the passage of the Antiterrorism and Effective

Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, (the "Act"). The prior standard for determining when an evidentiary hearing should be held in a federal habeas corpus proceeding was set forth in Townsend v. Sain, 372 U.S. 293 (1963) *overruled in part*, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). Under Townsend, a petitioner is entitled to an evidentiary hearing on a habeas claim when he (1) "alleges facts which, if proved, would entitle him to relief" and (2) if he "did not receive a full and fair evidentiary hearing in state court, either at the time of trial or in a collateral proceeding." Id. at 312. The decision to grant an evidentiary hearing generally rests within the sound discretion of the Court. However, Townsend set forth six circumstances when the Court must grant an evidentiary hearing on a habeas claim:

1. The merits of the factual dispute were not resolved in the state hearing;

2. The state factual determination is not fairly supported by the record as a whole;

3. The fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

4. There is a substantial allegation of newly discovered evidence;

5. The material facts were not adequately developed at the state court hearing;

6. Or for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing. Townsend, 372 U.S. at 313.

In setting forth the standard for granting an evidentiary hearing in federal habeas proceedings, the Townsend court recognized the importance of a hearing in determining a petitioner's claims. The court noted that "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of factual issues." Id. at 312. Townsend also noted that the Supreme Court "has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights." Id. at 316.

In analyzing whether the cause of the failure to adequately develop the facts in state court rested with the petitioner, identified as factor five, the Townsend court used the standard of "deliberate bypass" from Fay v. Noia, 372 U.S. 391 (1963). However, in Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715 (1992), the Supreme Court adopted a different test: the stricter "cause and prejudice" standard used in procedural default cases. The Court saw the failure of a petitioner to develop the factual basis of a claim in state court as similar to a petitioner who defaults a claim under a state procedural rule. The Court felt that a petitioner should not be excused for a "negligent failure to introduce any evidence of his own to support a constitutional claim." Id. 504 U.S. at 8-9. However, a petitioner could still get a hearing if he could show that a "fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Id. at 11.

2. Post-Act Standard Governing Motion for Evidentiary Hearing.

The basis asserted by the Attorney General for vacating the order granting an evidentiary hearing is the changes made to 28 U.S.C. § 2254(e) by the Act. The modified 28 U.S.C. § 2254(e)(2) states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -
>
> (A) the claim relies on -
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered

through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The modification of § 2254(e)(2) appears to be a codification of the Tamayo-Reyes holding, i.e., that an evidentiary hearing shall not be granted if petitioner fails to develop the facts of his claims in state court and fails to show cause and prejudice or a fundamental miscarriage of justice to excuse the failure. Tamayo-Reyes, 504 U.S. at 8-11 (emphasis added). Congress must have found that such a codification was necessary because Tamayo-Reyes was a 5 to 4 decision, with a fairly strong dissent written by Justice O'Connor, and joined by Justice Blackmun, Justice Stevens, and

Justice Kennedy. In addition, Justice Kennedy filed a separate dissenting opinion.

However, the Act is silent as to the remaining factors of Townsend; as Tamayo-Reyes only addressed the fifth circumstance under Townsend. Id. 504 U.S. at 4. The Ninth Circuit also clearly reads Tamayo-Reyes as holding that "a hearing is not mandatory under *Townsends' fifth* circumstance ('the material facts were not adequately developed at the state court hearing') unless the petitioner can show cause for failing to develop the material facts in state court and prejudice resulting therefrom." Chacon v. Wood, 36 F.3d 1459, 1466 (9th Cir. 1994). The Ninth Circuit went on to state that "[b]oth the *Tamayo-Reyes* opinion and Justice O'Connor's dissent suggest that, as is evident from the very nature of the various *Townsend* circumstances, the cause-and-prejudice rule imposed by *Tamayo-Reyes* applies principally to cases in which the petitioner seeks an evidentiary hearing on the basis of *Townsend's* fifth circumstance." Id. (internal citations omitted). The

court went on to find therefore that the cause and prejudice test of *Tamayo-Reyes* did not apply when a hearing is requested the fourth circumstance of *Townsend*. Id.

This silence strongly suggests that the Act was not intended to overrule Townsend. The Act specifically provides for one circumstance when a federal court may not hold an evidentiary hearing, it does not otherwise restrict when a court may hold one. Therefore, a federal petitioner would still be entitled to an evidentiary hearing if he did not receive a full and fair hearing in state court. In other words, the other Townsend factors would still form a basis for the order of an evidentiary hearing.

The Act does clearly modify the presumption of correctness afforded to state court factual determinations. See 28 U.S.C. § 2254(e)(1). The former 28 U.S.C. § 2254(d) contained eight factors, which dictated when a state court factual finding would not be entitled to a presumption of correctness. These

factors were removed under the new amendments. However these eight factors did not control when an evidentiary hearing was necessary.

As stated by the Supreme Court:

> it is evident that [the former] § 2254(d) does not codify *Townsend*'s specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or

absence of any of the statutory exceptions will determine whether a hearing is held.

Tamayo-Reyes, 504 U.S. at 10, fn. 5.

Therefore the fact that the eight factors were replaced by a stricter presumption of correctness, and what appears to be a codification of Tamayo-Reyes does not change the analysis of a need for an evidentiary hearing. This is made even more clear by the language in 2254(e)(1) which now governs when the factual presumption of correctness applies. § 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." It makes logical sense that the only opportunity that an applicant would have to rebut the presumption would be in an evidentiary hearing.

The very next line of the statute then sets forth the one instance in which the court cannot hold an

evidentiary hearing. As pointed out by respondent, this instance arises when "the applicant has failed to develop the factual basis of a claim in state court proceedings," and the applicant has not satisfied the requirements under § 2254(e)(2). Although the amendments strengthen the presumption of correctness afforded to state court findings, this would affect the burden of proof accorded to the parties for issues litigated at an evidentiary hearing. The other Townsend factors, which do not appear to be overruled by the Act, focus on whether a full and fair hearing was held in state court. Indeed the need for a full and fair hearing, whether in state or federal court, was the main rationale behind the decision in Townsend.

It is true however, that if the Act is read literally, a hearing does not seem to be required for the presumption of correctness to attach to state court findings of fact. Specifically § 2254(e)(1) states that "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." In comparison, the former statute specified that a presumption of correctness applied to "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceedings to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, . . ." 28 U.S.C. § 2254(d) (1948), *amended by* 28 U.S.C. § 2254(e)(1) (1996) (emphasis added).

Nevertheless, it is difficult to envision how a state court could make a determination of fact without some kind of hearing and have that finding bind a federal court's determination of federal constitutional issues. Therefore, the Act should not be read as taking away this Court's power to order an evidentiary hearing when there has not been a full and fair hearing in state court,

unless the petitioner has failed to develop the claims in state court.

3. Application of 28 U.S.C. § 2254(e)(2)(A) To This Case.

The question before the Court is whether the Act precludes the Court from holding an evidentiary hearing in petitioner's case. The answer is that it does not.

As discussed above, the Act envisions a hearing in federal court if petitioner did not receive a hearing in state court and the failure to develop the claim in state court was not a result of petitioner's "negligent failure to introduce any evidence of his own to support a constitutional claim." Tamayo-Reyes, 504 U.S. at 8-9. The Act did not change the law governing evidentiary hearings, instead it merely codified the decision of Tamayo-Reyes to ensure that a controversial five to four decision by the Supreme Court would be consistently followed. Since the new amendment was a codification of Tamayo-Reyes, petitioner's argument that "'failed to develop' ... only be understood as contemplating a

volitional choice evidenced by the petitioner's conduct of the litigation in the State court," is rejected. Clearly the standard is not whether the failure was volitional; rather even a negligent failure can bar the claim from being presented in an evidentiary hearing in federal court. Tamayo-Reyes, 504 U.S. at 8-9. However petitioner's second point, that the failure to develop bar "cannot apply to a litigant who, by state law provision and order, is precluded from developing the facts underlying his claims while still in that forum" has merit.

This Court granted an evidentiary hearing on some of petitioner's claims because he did not receive a hearing on those claims in state court. The Attorney General has failed to establish that petitioner "failed to develop the factual basis" of the claims subject to the evidentiary hearing. The Attorney General argues that the facts in support of petitioner's claims are being developed for the first time in federal proceedings. However, when a state prisoner files a state habeas petition, he cannot fully develop the factual basis of the

petition until the state court issues an order to show cause, which then entitles the petitioner to discovery and to other fact-finding processes of the court. Here petitioner was not allowed to obtain discovery and was not granted a hearing in state court, either of which would have allowed petitioner to develop his claims. Petitioner further asserts that judicial intervention was necessary to obtain the cooperation of trial counsel. Therefore no showing has been made that petitioner failed to develop the facts of his claims.

What is of paramount importance to the issue before this Court is that the amendment to 28 U.S.C. § 2254(e) merely codified pre-existing case law and did not change the standards which were applied when the evidentiary hearing was originally granted. So the fact that now respondent takes the position that petitioner failed to develop this claim in state court is of no consequence as this was already the law under Tamayo-Reyes when the parties submitted their supplemental briefing on the motion for an evidentiary

hearing. In other words, the modification of 28 U.S.C. § 2254(e) has not changed the standard governing the need for an evidentiary hearing or the Court's duty or discretion to order such a hearing.

4. Application of 28 U.S.C. § 2254(e)(2)(B) To This Case.

Since the Court has found that the amendment to 28 U.S.C. § 2254 did not change the standards governing the need for an evidentiary hearing, the Court does not need to decide whether 28 U.S.C. § 2254(e)(2)(B) must be read literally, so that if the petitioner failed to develop the claim in state court, he must then also show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B) (emphasis added).

However this Court points out that this portion of the amendment clearly appears to be a codification of

the portion of the Tamayo-Reyes holding wherein the Supreme Court stated that if a petitioner failed to properly develop the claim in state court, the claim could still be reviewed if the petitioner "can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Tamayo-Reyes, 504 U.S. at 11.

This amendment is contained in the provisions which are applicable to all federal habeas cases, both capital and non-capital. However, the Supreme Court has applied the "miscarriage of justice" exception involving constitutional errors in the capital sentencing context. Sawyer v. Whitley, 505 U.S. 333 (1992). In so doing, the Supreme Court rejected the notion that the miscarriage of justice standard for death sentencing errors required petitioner to "negate an essential element of the offense." Id. 505 U.S. at 343. Such a requirement is "too narrow" and "contrary to the statement in Smith that the concept of 'actual innocence' could be applied to mean 'innocent' of the

death penalty." Id. (quoting Smith v. Murray 477 U.S. 527, 537, (1986)). Instead, under the Sawyer formulation, the actual innocence exception applies when the "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under the applicable state law." Id. 505 U.S. at 336, 348; see also Clark v. Lewis, 1. F.3d 814, 821 (9th Cir. 1993) ("[i]n a capital case, 'actual innocence' can mean innocent of the death penalty."). Pursuant to Sawyer, the miscarriage of justice standard "must focus on those elements which render a defendant eligible for the death penalty" and must take into account "the applicable state law." Sawyer, 505 U.S. at 336, 347-48. This is in harmony with the reading given to § 2254(e)(2)(B) by the petitioner.

5. Retroactivity of 28 U.S.C. § 2254(e).

This Court does not have to address the retroactivity of 28 U.S.C. § 2254(e) because whether or not it applies, there is no substantive change to the

standards governing the grant of evidentiary hearings. In other words, the amendment is a codification of pre-existing case law which was controlling case law when this Court originally granted the evidentiary hearing. Since the amendment effected no real change, whether it is applied to this case or not is of no consequence.

6. The Ex Post Facto Argument and the Due Process Argument.

Since an examination of the amendment at issue reveals that there is no substantive change in the standards utilized to determine whether an evidentiary hearing should be granted, the Court does not need address Silva's arguments that the Ex Post Facto Clause would prohibit the application of the Act to pending cases, or that application of the Act would result in a violation of due process.

7. The Motion to Vacate the Order Granting the Evidentiary Hearing is Denied.

This Court finds that the amendments to 28 U.S.C. § 2254(e) are simply a codification of the pre-existing case law, which was in effect at the time the evidentiary hearing was granted and therefore the standards have not changed. Therefore, § 2254(e) does not provide a basis for this Court to rescind its order granting petitioner an evidentiary hearing on petitioner's ineffective assistance of counsel claims.

IT IS SO ORDERED.

Dated: June 24, 1996.

Dickran Tevrizian, Judge
United States District Court

APPENDIX C

The Antiterrorism and Effective Death Penalty Act of 1996

TITLE I-HABEAS CORPUS REFORM

SEC. 101. FILING DEADLINES.

Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.".

SEC. 102. APPEAL.

Section 2253 of title 28, United States Code, is amended to read as follows:

"2253. Appeal

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

"(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

"(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).".

SEC. 103. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"Rule 22. Habeas corpus and section 2255 proceedings

"(a) APPLICATION FOR THE ORIGINAL WRIT.--An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

"(B) CERTIFICATE OF APPEALABILITY.--In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of appealability is not required.".

SEC. 104. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended-

(1) by amending subsection (b) to read as follows:

"(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

"(A) the applicant has exhausted the remedies available in the courts of the State; or

"(B)(i) there is an absence of available State corrective process; or

"(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

"(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.";

(2) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(3) by inserting after subsection (c) the following new subsection:

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.";

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

"(A) the claim relies on-

"(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

"(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."; and

(5) by adding at the end the following new subsections:

"(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on

review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.".

SEC. 105. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended-

(1) by striking the second and fifth undesignated paragraphs; and

(2) by adding at the end the following new undesignated paragraphs:

"A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

"(1) the date on which the judgment of conviction becomes final;

"(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

"(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

"Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

"(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

"(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.".

SEC. 106. LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.

(a) CONFORMING AMENDMENT TO SECTION 2244(a).--Section 2244(a) of title 28, United States Code, is amended by striking "and the petition" and all that follows through "by such inquiry." and inserting ", except as provided in section 2255.".

(b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.--Section 2244(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

"(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.".

SEC. 107. DEATH PENALTY LITIGATION PROCEDURES.

(a) ADDITION OF CHAPTER TO TITLE 28, UNITED STATES CODE.--Title 28, United States Code, is amended by inserting after chapter 153 the following new chapter:

"CHAPTER 154-SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"Sec.
"2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.
"2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.
"2263. Filing of habeas corpus application; time requirements; tolling rules.
"2264. Scope of Federal review; district court adjudications.
"2265. Application to State unitary review procedure.
"2266. Limitation periods for determining applications and motions.

"2261. **Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment**

"(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who

are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record-

"(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation

shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

"2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

"(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if-

"(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

"(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

"(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless

the court of appeals approves the filing of a second or successive application under section 2244(b).

"2263. Filing of habeas corpus application; time requirements; tolling rules

"(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

"(b) The time requirements established by subsection (a) shall be tolled-

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

"(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

"(3) during an additional period not to exceed 30 days, if-

"(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

"(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

"2264. Scope of Federal review; district court adjudications

"(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is-

"(1) the result of State action in violation of the Constitution or laws of the United States;

"(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

"(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

"(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

"2265. Application to State unitary review procedure

"(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to 'an order under section 2261(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

"2266. Limitation periods for determining applications and motions

"(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

"(b)(1)(A) A district court shall render a final determination and enter a final judgment on any

application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

"(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

"(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

"(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

"(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

"(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

"(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

"(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

"(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

"(2) The time limitations under paragraph (1) shall apply to-

"(A) an initial application for a writ of habeas corpus;

"(B) any second or successive application for a writ of habeas corpus; and

"(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

"(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

"(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

"(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

"(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

"(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

"(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

"(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

"(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

"(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

"(2) The time limitations under paragraph (1) shall apply to-

"(A) an initial application for a writ of habeas corpus;

"(B) any second or successive application for a writ of habeas corpus; and

"(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

"(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not

be entitled, for the purpose of litigating any application or appeal.

"(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

"(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

"(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.".

(b) TECHNICAL AMENDMENT.--The part analysis for part IV of title 28, United States Code, is amended by adding after the item relating to chapter 153 the following new item:

"154. Special habeas corpus procedures in capital cases 2261.".

(c) EFFECTIVE DATE.--Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

SEC. 108. TECHNICAL AMENDMENT.

Section 408(q) of the Controlled Substances Act (21 U.S.C. 848(q)) is amended by amending paragraph (9) to read as follows:

"(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant

to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.".

COPY

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No. 96-1591

In the Supreme Court of the United States

October Term, 1996

Arthur Calderon, Warden, *Petitioner*,

v.

Benjamin Wai Silva, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PHILLIP A. TREVIÑO*
201 North Figueroa, Suite 700
Los Angeles, California 90012
(213) 622-9622

MICHAEL J. BRENNAN
729 Marine Avenue
Manhattan Beach, California 90266

Counsel for Respondent SILVA

* Counsel of Record for Respondent

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No. 96-1591
In the Supreme Court of the United States
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PHILLIP A. TREVIÑO*
201 North Figueroa, Suite 700
Los Angeles, California 90012
(213) 622-9622

MICHAEL J. BRENNAN
729 Marine Avenue
Manhattan Beach, California 90266

Counsel for Respondent SILVA

* Counsel of Record for Respondent

REASONS FOR DENYING THE WRIT

Certiorari Should Not Be Granted since the Lower Courts Have Not Ruled on the Question Presented Here

This is not an appropriate case for review by this Court since the question Warden Calderon advances has not been decided by either of the lower courts in this matter.

The Ninth Circuit ruling from which Warden Calderon now seeks review did no more than deny him permissive interlocutory review under 28 U.S.C. §1292(b).[1] Yet, Warden Calderon mischaracterizes the Ninth Circuit's denial of discretionary review as a ruling on the merits of the claim which he attempted to raise in that court, namely that the Antiterrorism and Effective Death Penalty Act (herein "the Act") is retroactive and should operate to preclude Silva from receiving an evident ary hearing in his federal habeas corpus proceedings.[2] This Court should not condone this effort and should deny the petition.

The Ninth Circuit did not decide in this case that the Act was retroactive in its application

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[1] The analysis the Ninth Circuit undertakes when it evaluates a petition for leave to appeal pursuant to 28 U.S.C. §1292(b) has long been clear: "When a party seeks a section 1292(b) interlocutory appeal, the court of appeals must undertake a two-step analysis. First, we must determine whether the district court has properly found that the certification requirements of the statute have been met. These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. If we conclude that the requirements have been met, we may, but need not, exercise jurisdiction. The second step in our analysis is therefore to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction." *In re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982)

[2] Silva has never received an evidentiary hearing before any court, state or federal.

to Mr. Silva.[3] The Ninth Circuit did not discuss nor rule upon the retroactivity of the Act or its proper application to Mr. Silva s proceedings in the District Court. As Mr. Silva's opposition to Warden Calderon's petition before the Ninth Circuit made clear, there were a multitude of reasons upon which the Ninth Circuit could have based its denial of interlocutory review, chief among them the fact the District Court explicitly stated that it was not addressing the retroactivity of the Act. In pertinent part, the District Court's order states as follows:

> 5. Retroactivity of 28 U.S.C. §2254(e).
>
> This Court does not have to address the retroactivity of 28 U.S.C. §2254(e) because whether or not it applies, there is no substantive change to the standards governing the grant of evidentiary hearings. In other words, the amendment is a codification of pre-existing case law which was controlling case law when this Court originally granted the evidentiary hearing. Since the amendment effected no real change, whether it is applied to this case or not is of no consequence.
>
> 6. The Ex Post Facto Argument and the Due Process Argument.
>
> Since an examination of the amendment at issue reveals that there is no substantive change in the standards utilized to determine whether an evidentiary hearing should be granted, the Court does not need address Silva's arguments that the Ex Post Facto Clause would prohibit the application of the Act to pending cases, or that application of the Act would result in a violation of due process.

Appendix B at B-27 to B-28.

Thus, in arguing to the Ninth Circuit that it should review the District Court's decision that the Act was not retroactive, Warden Calderon summarily ignored the District Court's explicit statement that it was not making such a finding or ruling on that issue. Warden

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[3] As reflected in Mr. Silva's Opposition to Warden Calderon's Petition to the Ninth Circuit for Interlocutory Review, there were a multitude of reasons that would have justified the Circuit's decision to deny the extraordinary appellate review that Warden Calderon was seeking: e.g., the District Court did not rule on this question; the requested review would not materially advance the litigation since, regardless of the outcome of this issue, there were additional issues the District Court would still be required to address; the fact that the evidentiary record had already closed in the District Court proceedings meant that a decision in this case would not provide guidance to other courts due to the particular posture of this litigation. *See* Appendix.

Calderon persists in his refusal to accep. the District Court's reasoning by advancing --- now to this Court -- a construction that cannot find support in the decisions of the District Court or the Ninth Circuit. Those courts did not rule on this question in deciding to allow Mr. Silva the first evidentiary hearing he has ever had in his capital habeas proceedings.

All that the Ninth Circuit did was dismiss Warden Calderon's petition for interlocutory review, observing in the process that in a different matter the Ninth Circuit had determined that the Act was not applicable to cases pending in the federal courts at the time of its enactment. For this reason, if any petition for certiorari were to issue, it could properly address solely whether it was an appropriate exercise of judicial discretion for the Ninth Circuit to deny Warden Calderon the extraordinary interlocutory review he sought.[4]

CONCLUSION

This case is not an appropriate case for determination of the question Warden Calderon advances. The Ninth Circuit did not give rule on the merits of ***any*** question; it merely denied discretionary review. The District Court explicitly stated that it was not ruling upon the question Warden Calderon advances in this Court. This Court should deny the petition for certiorari.

Respectfully submitted,

Phillip A. Treviño

Dated: May 19, 1997

Phillip A. Treviño

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[4] Nothing in the proceedings had to date in the Ninth Circuit will preclude Warden Calderon from obtaining review on the merits of his claim after a judgment issues from the District Court.

No. 96-80269

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN WAI SILVA,

Petitioner-Respondent,

v.

ARTHUR CALDERON, et al.,

Respondent-Petitioner.

DEATH PENALTY CASE

ANSWER TO PETITION FOR PERMISSION TO APPEAL

UNDER 28 U.S.C. §1292(b)

Phillip A. Treviño
201 North Figueroa, Suite 700
Los Angeles, California 90012
(213) 622-9622

Michael J. Brennan
740 Marine Avenue
Manhattan Beach, California 90266
(213) 7402527

Attorneys for Petitioner-Respondent
Benjamin Wai Silva

No. 96-80269

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN WAI SILVA,

Petitioner-Respondent,

v.

ARTHUR CALDERON, et al.,

Respondent-Petitioner.

DEATH PENALTY CASE

ANSWER TO PETITION FOR PERMISSION TO APPEAL

UNDER 28 U.S.C. §1292(b)

TO THE HONORABLE JUDGES OF THIS COURT:

Petitioner-Respondent Benjamin Wai Silva,[1] by and through his attorneys of record, Phillip A. Treviño and Michael J. Brennan, hereby answers and opposes Respondent-Petitioner

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[1] Pursuant to Rule 28 of the Federal Rules of Appellate Procedure, the following denomination is used for references to the Parties: Petitioner in the District Court (and Respondent in this matter before this Court) is referred to as Mr. Silva in all instances excerpt where otherwise referred to as Petitioner during previous court proceedings and records; Respondent in the District Court (and Petitioner before this Court) is similarly referred to as Warden Calderon.

Warden Calderon's Petition for leave to pursue an interlocutory appeal of the District Court's decision to proceed with an evidentiary hearing in this capital matter.

Respectfully submitted,

Dated: May ___, 1997

Phillip A. Treviño

Introduction

Interlocutory review should not be granted for several reasons. Fundamentally, the order Warden Calderon seeks to have reviewed concerns whether the newly enacted Antiterrorism and Effective Death Penalty Act (referred to herein as "the Act") should deprive Mr. Silva of the evidentiary hearing which the District Court has granted him. As will be shown, this order simply does not meet the statutory requirements for such extraordinary review. As presented by the facts of this case, the District Court's order is so narrow that, contrary to Warden Calderon's view, an interlocutory appeal would not offer other District Courts the guidance in applying the Act to other cases since this case and the challenged ruling are predicated upon entirely distinguishable facts.

In addition, interlocutory appeal of the issue will not materially advance the litigation below, and may ultimately serve to delay the lower court proceedings. Interlocutory review would fully resolve the question of Mr. Silva's entitlement to an evidentiary hearing only if this Court were first to decide the proper application of the Act, and then, if it decided that question adversely to Mr. Silva, if the Court were to go on to decide additional constitutional issues, which are not discussed by Warden Calderon's petition and which the District Court did not reach.[2] Since the District Court sustained Mr. Silva's right to this evidentiary hearing on other

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[2] As explained elsewhere in this pleading, even then the litigation below would not be materially advanced thereby. As the District Court noted when it announced its decision sustaining its previous grant of a hearing, even if that particular decision were appealed and overturned, it would still need to proceed to review various other materials that had been offered in support of the claims pending before it. For this reason, Mr. Silva disagrees with Warden Calderon's premise that interlocutory review will materially advance the proceedings below. Whatever resolution may be had relative to the question Warden Calderon seeks to put before the

grounds, it did not reach the constitutional issues involved. Accordingly, even assuming this Court were to disagree with the District Court's order, unless this Court were to reach the constitutional grounds raised - but not decided - below, interlocutory review would not expedite the matters below. Rather, the District Court would then be required, on remand, to address significant constitutional issues before determining whether to proceed with an evidentiary hearing. Although Warden Calderon does not discuss these points in his Petition, the only plausible way an interlocutory appeal could expedite the litigation below is if, upon resolution of this initial question, this Court were then additionally to consider and resolve issues of constitutional proportion which were not considered or resolved below. Such a result, if obtained, is an improper expansion of, and far beyond, what §1292(b) contemplates.

Finally, Warden Calderon's petition must be recognized as an abuse of the appellate process, for it invokes complex arguments which were never presented to or considered by the District Court. It is Warden Calderon's position here, never presented to the District Court, that the Act rewrote virtually an entire decade of capital habeas jurisprudence. The petition argues that the District Court's interpretation of the Act is at odds with more than a decade of legislative history that, according to Warden Calderon, must be considered to understand the background and scope of the Act. Mr. Silva objects to Warden Calderon's arguing points before this Court that he did not present to the District Court for consideration. An interlocutory appeal should not granted where, as here, the would-be appellant advances arguments not presented

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Court now, even should he prevail ultimately on the merits, the proceedings before the District Court will not thereby be concluded.

below.

The District Court's decision to sustain its prior grant of an evidentiary hearing was a proper exercise of the judicial function in applying newly enacted legislation to ongoing litigation. The District Court analyzed the newly enacted statute as well as the case law and determined that Mr. Silva was entitled to offer evidence in support of his claims. The District Court accordingly concluded that the Act did not warrant reversal of its prior decision to afford an evidentiary hearing. The District Court's decision was well reasoned and should not be the subject of review on an interlocutory basis. For this reason it is respectfully urged the Court should deny Warden Calderon's request to commence piecemeal appellate litigation.

Procedural and Factual Background

Following his conviction at trial, Mr. Silva was sentenced to death by a California jury. Thereafter, he appealed both his conviction and sentence to the California Supreme Court. Concurrent with his direct appeal to that court, Mr. Silva also sought the state court's review by habeas corpus of both his conviction and sentence. In his ensuing state petitions for habeas corpus review, he alleged, *inter alia*, ineffective assistance of counsel. These claims alleged various ways in which Mr. Silva had been denied his Sixth Amendment right to the effective assistance of counsel at his trial. No hearing was granted on the petitions by the California Supreme Court and they were summarily denied. Mr. Silva's direct appeal was similarly denied.

After unsuccessfully petitioning the U.S. Supreme Court for review by certiorari, Mr. Silva filed a petition for a writ of habeas corpus in the United States District Court for the

Central District of California. In his petition, Mr. Silva again alleged various instances of ineffective assistance of counsel. In order to sustain his burden of proof, Mr. Silva sought leave to obtain discovery and thereafter to present evidence in support of his claims at an evidentiary hearing. These requests were initially denied by the District Court.

Following other proceedings not germane here, Mr. Silva was permitted to amend his petition. His amended petition included some claims which the District Court found to be reiterations of previous claims, and other claims which the District Court found to be genuinely new. These "new" claims were found to be unexhausted in that they had not been presented to the California Supreme Court for decision. Mr. Silva thereupon presented the unexhausted claims to the California Supreme Court, and that court again summarily denied relief.

It was at this juncture that the District Court reconsidered its previous rulings relative to whether Mr. Silva should receive discovery and an evidentiary hearing. In doing so, the District Court analyzed those questions in a fifty-seven (57) page order. Lending substantial deference to the fact that Mr. Silva had never been afforded, in any court, the opportunity to demonstrate the evidentiary support for his claims of constitutional deprivation, the District Court concluded that both discovery and a hearing were warranted on selected claims contained in the petition.[3]

As a result of the District Court's decision, the parties thereupon undertook what would

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[3] Mr. Silva notes that he has previously objected to, and continues to object to, the District Court's denial of a discovery and/or a hearing as to certain issues upon which he seeks relief. Nothing set forth here should be construed as a waiver of any such objections.

prove to be a relatively difficult discovery process.[4] At the conclusion of that process, the parties prepared and submitted to the District Court a stipulation which delineated the written materials which the parties agreed would comprise the record of the evidentiary hearing.[5] The stipulation further noted that no live testimony would be received and that, with receipt of the specified materials, the record would be deemed closed.

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[4] This process was complicated principally by the unwillingness of trial counsel to cooperate. While Warden Calderon is correct in noting that trial counsel sought compensation for his fees, that was by no means the sole difficulty brought about by trial counsel's behavior. These concerns were discussed repeatedly with Warden Calderon's counsel, and at each juncture, whenever possible, efforts were made, and frequently by agreement of the parties, to accommodate trial counsel. Nonetheless, as the record does clearly disclose, a formal subpoena was sought to secure trial counsel's attendance at the scheduled evidentiary hearing. Notwithstanding the District Court's issuance of the subpoena, trial counsel refused to accept service by the U.S. Marshal, instead advising the undersigned counsel he would have to be arrested and brought in forcibly by the Marshal. Additionally, he noted that he intended to speak with the "presiding judge" about District Court Judge Tevrizian's "behavior." This was but a continuation and culmination of the demeanor he had been exhibiting. The undersigned counsel advised Warden Calderon's counsel, Robert Foster, of the same, and noted that he was unable to determine whether trial counsel would appear at the evidentiary hearing. These, and further, facts were all promptly brought to Mr. Foster's attention over the course of the months long discovery process. Nonetheless, Warden Calderon has represented to this Court that there is no indication in the record to support the argument that trial counsel has been uncooperative in the habeas process. It is only due to ongoing efforts by current federal habeas counsel, and to the extent possible, agreements reached with opposing counsel, that the District Court was not burdened with such matters. Both parties consistently sought to resolve these matters between themselves, and have accordingly had no need to file pleadings documenting the ongoing problems. This does not change or otherwise compensate for the difficulties Mr. Silva has encountered in accomplishing these goals. Warden Calderon's averment that "[t]here is no support for th[e] claim [that trial counsel was unwilling to cooperate] in the record" (*Petition*, page. 29, n. 3) must be viewed against this background for a full appreciation of the matter.

[5] These materials included exhibits previously filed with the District Court, materials filed concurrent with the stipulation, and transcripts of the depositions taken during the discovery process.

On April 29, 1996, the District Court signed the proposed order which accompanied this stipulation. However, the order was contingent upon resolution of the present issue regarding the application of the Act which became effective six (6) days prior to the hearing.

After the parties had briefed the application of the new Act to this matter, the District Court, in a seventeen (17) page written order, concluded that its previous order granting the evidentiary hearing should stand, notwithstanding the passage of the Act. It is from this order that Warden Calderon seeks interlocutory review.

It is to be noted that, should the District Court's order stand, the only proceeding which remains before the District Court relative to the evidentiary hearing is the briefing of the unadjudicated issues presented by the petition and as to which the evidentiary record is already closed and before the District Court.

Question Presented

The question the District Court faced was whether a federal capital habeas petitioner, who has never been afforded (by any court, state or federal) the opportunity to present evidence in support of his federal constitutional claims, and who has presented his claims to the highest state court and thereupon was denied relief, has a right to offer evidence in support of those claims? As the record below discloses, the District Court reached this question only after having determined both that there are factual issues joined by the claims and that, if the petitioner is able to sustain his burden, he will be entitled to relief. After passage of the Act, the District Court was asked to reconsider its decision.

The District Court's renewed conclusion, rooted in an analysis of the controlling case law as well as the new Act, was that, under the circumstances presented by this case, Mr. Silva was still entitled to an opportunity to submit evidence to prove his claims.

Warden Calderon seeks, by way of interlocutory appeal, to have this Court review that decision. He argues that the new Act operates in such a way as to preclude Mr. Silva from ever having a hearing on any of his constitutional claims. The District Court rejected this argument and choose to proceed with the hearing. To permit Warden Calderon the opportunity to seek interlocutory review, the District Court agreed to stay its proceedings, however.

This Court should deny interlocutory review and permit the District Court proceedings to go forward. As will be shown below, Warden Calderon has not carried and cannot carry his burden of justifying the unusual disruption of District Court proceedings with an interlocutory appeal in this matter. Additionally, no prejudice will occur to Warden Calderon's ability to seek review of this order in the normal course of proceedings, namely after a final decision and judgment have been entered in the District Court.

THIS CASE DOES NOT SATISFY THE REQUIREMENTS FOR DISCRETIONARY INTERLOCUTORY APPELLATE REVIEW UNDER 28 U.S.C. §1292(b).

Interlocutory appellate review under 28 U.S.C. §1292(b) is available only in certain limited circumstances, none of which are found here. As this Court has stated:

> When a party seeks a section 1292(b) interlocutory appeal, the court of appeals must undertake a two-step analysis. First, we must determine whether the district

court has properly found that the certification requirements of the statute have been met. These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. If we conclude that the requirements have been met, we may, but need not, exercise jurisdiction. The second step in our analysis is therefore to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction.

In re Cement Antitrust Litigation (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1982)

As will be shown, the certification of this matter for interlocutory appeal was improvident, and such review should not be granted. However, even if this Court should conclude otherwise, this Court should exercise its discretion, decline to hear the appeal at this point, and thereby permit the District Court proceedings to resume.

When these points are considered in the context of this case, as well as against the general proposition that piecemeal appeals are disfavored,[6] it becomes clear that Warden Calderon's petition for leave to file an interlocutory appeal should be denied.

I.

The Order Appealed from does not Involve a

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6 *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966)(federal law has an expressed policy against piecemeal appeals); *see also Matterhorn, Inc. v. NCR Corp.*, 727 F.2d 629 (7th Cir. 1984); *and D'Ippolito v. Cities Service Co.*, 374 F.2d 643 (2d Cir. 1967).

"Controlling Question of Law" as that Term is Used in 28 U.S.C. §1292(b)

Warden Calderon has taken significant license in framing his questions in his attempt to receive permission to proceed with an interlocutory appeal. It true that the District Court certified this matter for a possible interlocutory appeal.[7] A simple review of the District Court's order (attached as Exhibit 2 to the Petition) discloses that it did not, however, certify the questions that Warden Calderon now seeks to put before the Court. In fact, the District Court certification recites no particular question as justifying this review. It contains simply the unexplicated assertion that its June 26, 1996, order implicates a "controlling question of law." Warden Calderon's petition must be considered in this light.

The first two questions Warden Calderon urges in his Petition are not simply not questions the District Court decided. The third question is far too fact-bound a question to be properly characterized as a controlling question of law. Additionally, the questions Warden Calderon has framed must be decided adversely to him in any event.

Warden Calderon contends the following questions are presented for review here:

1. Did the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 so alter the statutory standards for granting an evidentiary hearing in federal habeas corpus cases that the holdings in *Townsend v. Sain*, 372

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[7] Of course, as this Court is no doubt well aware, even the simple fact the District Court has certified the order below to raise a "controlling issue of law" is a finding that is not binding upon this Court and which this Court should examine anew to its satisfaction. "The opinion of the district judge that a controlling question is involved, while deserving of careful consideration, is not binding upon this court when we are called upon to exercise our discretion under the statute." *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959).

U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953) are no longer good law?

2. Are the amendments to 28 United States Code section 2254(d) contained in this new legislation applicable to cases pending in the federal district courts when the legislation was signed into law?

3. Did Petitioner make the requisite showing under the new legislation that he was entitled to an evidentiary hearing under the new standards?

Petition, pages 2-3.

The District Court did not sustain its grant to Mr. Silva of an evidentiary hearing because of any "statutory" requirement. Indeed, the District Court's analysis did not implicate - despite Warden Calderon's protestations - the success or the failure of the Act to overrule or otherwise invalidate *Townsend* and *Brown*. Rather, as those cases demonstrate, the entitlement to an evidentiary hearing is rooted in constitutional and common law principles.[8] These principles have been given structure by subsequent statutory provisions, a point the District Court noted and discussed. However, this does not permit Warden Calderon's flawed premise that therefore

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[8] "The broad considerations bearing upon the proper interpretation of the power of the federal courts on habeas corpus are reviewed at length in the Court's opinion in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, and need not be repeated here. We pointed out there that the historic conception of that writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day. We pointed out, too, that the Act of February 5, 1867, c. 28, s 1, 14 Stat. 385--386, which in extending the federal writ to state prisoners described the power of the federal courts to take testimony and determine the facts de novo in the largest terms, restated what apparently was the common-law understanding. *Fay v. Noia*, 372 U.S., p. 416, 83 S.Ct., p. 837, n. 27." *Townsend v. Sain,* 372 U.S. at 310-311.

subsequent statutory changes can abrogate the underlying constitutional principles which ultimately govern these questions.

The District Court's discussion of *Townsend* was simply designed to illustrate how the statutory provisions provided a framework in which a court could analyze whether to grant a hearing. It did not, however, purport to reduce the right to a hearing, or the writ of habeas corpus itself, to a non-constitutional dimension as Warden Calderon is trying to do. The District Court simply discussed the statutory framework by which it had reached its decision, and thereafter reaffirmed its view that, based upon the case law, Mr. Silva was entitled to the hearing. Since the case law the District Court discussed in its decision makes clear habeas corpus has constitutional dimensions, it flows logically that the District Court did not perceive the question as Warden Calderon does. Clearly statutory provisions do not summarily invalidate constitutional principles.[9] For this reason, Warden Calderon's first question is not the question decided by the District Court.

As to the second question Warden Calderon suggests to this Court, the District Court does not appear to have considered whether §2254(d) (as amended) even applies to this matter.[10]

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9 Moreover, the District Court did not even perceive any tension between the newly enacted statutory provisions and the pre-existing case law which delineated the right to an evidentiary hearing. Rather, the District Court quite properly and easily harmonized the new provisions with the case law. "The Act did not change the law governing evidentiary hearings, instead it merely codified the decision of *Tamayo-Reyes* to ensure that a controversial five to four decision by the Supreme Court would be consistently followed." *Order*, page 13, lines 7-10.

10 As the District Court notes in its *Order*, "The basis asserted by the Attorney General for vacating the order granting an evidentiary hearing is the changes made to 28 U.S.C. §2254(e) by the Act." *Order*, page 8, lines 2-4. Nowhere in the *Order* does the District Court

Rather, its decision discusses the amendments to 28 U.S.C. §2254(e), discussing its operation and concluding that it found it unnecessary to address the question of that section's retroactivity. *Order*, page 16, lines 13-20 (attached as Exhibit 1 to Petition).

Since Warden Calderon had not mentioned 2254(d) at all in his initial pleading invoking the new Act, and thereafter mentioned it only in passing in his reply to Mr. Silva's opposition to the request for reconsideration of the entitlement to an evidentiary hearing, it is most plausible the District Court did not even perceive this as a basis asserted by Warden Calderon for seeking to preclude a hearing. It is clear that the District Court did not rule on this point. Not having received a decision on this point from the District Court, Warden Calderon should not be permitted to raise the point here for the first time.

Finally, Warden Calderon's third question, whether Mr. Silva has made the requisite showing that he is entitled to an evidentiary hearing under the new provisions, is, by its very terms, a factually oriented question rather than a question of law. As such, it does not warrant the extraordinary review implicated by interlocutory appeal.[11]

Although this Court has recognized that Congress left the definition of "controlling question of law" unclear, there is guidance to be found in the area.

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discuss or construe 2254(d)(as amended). (There is discussion of the *prior* 2254(d), however, at page 10.)

[11] Additionally, this question is subsumed in the first question discussed above. Since the new provisions harmonize with the pre-existing case law, and since the District Court determined that Mr. Silva was entitled to a hearing under those provisions, there is no "new" finding here relative to the Act. This component of the District Court's decision is integral to and a logical consequence of the first analysis.

> While Congress did not specifically define what it meant by "controlling," the legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation. *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam); *Milbert v. Bison Laboratories*, 260 F.2d 431, 433-35 (3d Cir. 1958). Although some circuits have criticized such a narrow approach to interlocutory appeals, *see, e.g., Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702-03 (5th Cir. 1961), recently the Supreme Court in *Coopers & Lybrand* indicated its approval of the "exceptional circumstances" standard of section 1292(b) when it stated that the appellant "still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand*, 437 U.S. at 475, 98 S.Ct. at 2461.

In re Cement Antitrust Litigation (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1982). This ability to avoid protracted and expensive litigation is a showing that Warden Calderon has not made and cannot make. Almost all of the underlying litigation relative to the evidentiary hearing has already concluded in the District Court. Regardless of how this Court might decide the application of the Act, the District Court will be required to evaluate the claims in the petition and to render a decision thereupon. There is simply no justification for disrupting the normal course of this litigation.

In *In re Cement Antitrust Litigation (MDL No. 296)*, this Court went on to note the

following:

> Some courts have adopted the view that a question is controlling if it is one the resolution of which may appreciably shorten the time, effort, or expense of conducting a lawsuit, *see Katz v. Carte Blanche Corp., supra*, 496 F.2d at 755-56; *Hadjipateras v. Pacifica, S.A., supra*, 290 F.2d at 702; *E. F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 403 (S.D.Tex.1969), thus essentially reading the "controlling question of law" requirement out of section 1292(b). We reject this approach. Congress could easily have chosen only to require that a question materially advance the litigation in order for it to be immediately reviewable. Since Congress chose to add the additional requirement that the issue for which review is sought must be a "controlling question of law," it would be improper for us to construe the statute as though these two requirements were interchangeable.

Id., 673 F.2d at 1027. Warden Calderon has not demonstrated how granting his petition would materially advance this matter.

In addition, the questions Warden Calderon presents are not the "clear-cut question[s] of law, against a background of determined and immutable facts" which another court found justifies interlocutory review. As the Temporary Emergency Court of Appeals noted in denying review in *Lerner v. Atlantic Richfield Co.*, 690 F.2d 203 (Temp. Emer. Ct. App. 1982), "The question of law decided does not meet the requirement that ". . . the order involve a clear-cut question of law, against a background of determined and immutable facts." 9 Moore's Federal Practice P 110.22(2); Wright, Law of Federal Courts s 102 (3rd ed.), Note 53 at page 518."

Lerner, 690 F.2d at 211.

As the *Lerner* court went on to discuss, additional light was cast on why the questions before that court did not lend themselves to interlocutory review when one considered that:

> In pretrial or trial, after all possible amended pleadings and potential evidence are submitted and all theories of discovery explored, a judgment for or against the petitioner may be entered on the petitioner's claim in a manner that makes immaterial the issues determined by the partial summary judgment. The action of the District Court in refusing to enter a full summary judgment is evidence of a reservation of decision on other possible theories of recovery by petitioner Lerner.

Id. So, too, here there are still a myriad of remaining possible outcomes. The District Court has not entered judgment for or against Mr. Silva on any of these claims. After consideration of the proffered evidence, the District Court may still resolve the claims in a variety of ways. For this reason, even assuming arguendo that the District Court's decision should later be held erroneous, this does not mean that the ultimate result of the litigation will necessarily be reversed.

There is no "controlling question of law" at work here. The issue that has been decided is simply one of many procedural steps toward a final judgment on the merits. For these reasons, Warden Calderon's petition is misguided and should be denied given the factual underpinnings of the District Court's ruling.

II.

The Factual Basis of the District Court's Order Gives Rise To A Narrow Question Which Does Not Warrant Exercise of this Court's Discretionary Interlocutory Appellate Jurisdiction

The evidentiary hearing contemplated in this matter by the District Court will address a very limited range of fact-bound questions.

The principal focus of the evidentiary hearing is relative to whether Mr. Silva's trial counsel was ineffective in his representation of Mr. Silva at his capital trial. Mr. Silva first advanced his position that his trial counsel had been ineffective while pending review of his conviction by the California Supreme Court.[12] Although Warden Calderon seems to suggest otherwise here, Mr. Silva contends that the California Supreme Court's habeas procedures effectively prevented him from presenting the evidence necessary to secure relief from that court. The District Court adopted Mr. Silva's position on this point in its most recent order,[13]

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12 Mr. Silva has persisted in this contention, which has been amplified to some extent, as his matter has gone from state review of his conviction and sentence to habeas review in federal district court.

13 As noted in Mr. Silva's pleading entitled "Opposition to the Motion to Vacate the Court's Prior Order Granting an Evidentiary Hearing":

> "This Court will wish to note that the California Supreme Court's practice in capital habeas matters has been and is to receive petitions for a writ of habeas corpus in capital matters initially without any responsive pleading from the California Attorney General's Office. In the event the Court calls for a response from the California Attorney General's Office, it terms the subsequent briefing "informal." Thereafter, based upon its review of the matter, its practice has been either to deny the petition summarily, or it may issue an order to show cause.
>
> Only if an order to show cause is issued does the matter become a "cause" within the meaning of that term in the California Constitution, Article VI, §14. It is accordingly only at that point that any of the rights litigants otherwise enjoy even arguably begin to attach.
>
> Accordingly, when a capital litigant is not even granted consideration of his matter by issuance of an order to show cause, he is denied relief prior to having even an arguable entitlement to discovery and the other fact-finding processes of the court.
>
> In cannot be said, either, that such a litigant will have any different success

finding that "when a state prisoner files a state habeas petition, he cannot fully develop the factual basis of the petition until the state court issues an order to show cause, which then entitles the petitioner to discovery and to other fact-finding processes of the court. Here [Mr. Silva] was not allowed to obtain discovery and was not granted a hearing in state court, either of which would have allowed petitioner to develop his claims." *Order*, page 14, lines 1 - 7.[14]

> in the court from which his cause originated. In *People v. Gonzalez*, 51 Cal.3d 1179 (Cal. 1990), the California Supreme Court stated clearly that, as it reviewed its decisions dating back as far 1952, it was persuaded thereby that once a criminal matter was concluded in the trial court there was no action pending, and accordingly, no vehicle via which a trial court could consider or grant a convicted defendant discovery of any nature.
>
> As recently explained . . ."a trial court [lacks authority] to entertain a post judgment discovery motion which is unrelated to any proceeding then pending before [that] court. . . . "
> *Gonzalez*, 51 Cal.3d 1257. (citation omitted) This principle, coupled with the California Supreme Court's "informal" consideration of habeas corpus petitions it receives, means that a capital defendant, unless or until the California Supreme Court issues an order to show cause relative to his petition, has no judicial resource available to him through which he can obtain discovery or otherwise expect to develop his claims." *Opposition*, page 29, line 21, through page 30, line 20.

While Warden Calderon dismissed these points as irrelevant to the District Court's inquiry, (*Respondent's Reply to Petitioner's Opposition to Application of New Legislation*, page 21, lines 17 - 19), he did not in any way question, challenge, or seek to amplify this explanation of California Supreme Court habeas practice and procedure. It is respectfully submitted this failure to do so is precisely because the California Attorney General's Office was compelled to recognize it as an accurate recital of the limitations placed upon habeas petitioners' abilities to develop factual records in that court.

[14] It is of note that Warden Calderon did not challenge or other reject any of the explanations that Mr. Silva proffered the District Court regarding the procedures and case law followed by the California Supreme Court when it evaluates and adjudicates capital habeas petitions. However, here Warden Calderon seems to ignore his acquiescence below in these matters, and instead seeks to apply a different characterizations to the procedures with which his counsel, the California Attorney General, has been familiar for many years. It appears that in

Thus, Mr. Silva did not "fail to develop" the facts that he seeks to adduce in support of his claim. Rather, the California Supreme Court's case law and procedures are such that, upon the filing of his habeas petition, Mr. Silva was compelled to await leave of the state court before he could take the matter any further. Since that court thereupon summarily denied him relief, Mr. Silva was never permitted to undertake discovery before that court nor was he permitted to call witnesses in support of his claims at any type of evidentiary hearing.

The District Court also found that Mr. Silva has alleged various constitutional infirmities which go both to his conviction and his sentence. Since the California Supreme Court declined to grant him a hearing on these issues, coupled with the fact these issues - if proved - would invalidate the conviction and sentence, the District Court concluded that an evidentiary hearing is appropriate. On the facts of this case, these findings and conclusions are appropriate and correct.

Accordingly, the District Court's order granting Mr. Silva an evidentiary hearing flows logically from that court's understanding of both federal case law as well as California and federal habeas corpus procedures, all in place for decades. Those procedures, and the history of

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doing so he hopes this Court will conclude the District Court was erroneously informed, or that this Court will conclude that in fact Mr. Silva had more opportunity available to him than the record discloses, to develop facts in support of his petition for habeas relief in the state court system. Yet, Warden Calderon cannot openly dispute this since the case law and the practices of the California Supreme Court in this regard are too well known to his counsel to permit such a representation. The facts on this point are simply and clearly established: the California Supreme Court does not allow a habeas petitioner recourse to any judicial intervention until such time as it issues an order to show cause in the matter. No such order to show cause was issued in response to Mr. Silva's petitions before the California Supreme Court, and he was accordingly not permitted to develop his claims more than he did. The District Court was aware of these facts and took them into account in determining that it was appropriate for it to hold an evidentiary hearing.

this case, mandate an evidentiary hearing in the District Court. The District Court has not invalidated the Act, but rather simply and correctly determined that it against this particular background it does not operate to deprive Mr. Silva of a hearing.

Still further, and contrary to Warden Calderon's insinuation, this case does not present any overtones of intrusive federal meddling with state court judgments. The District Court is not simply "tinkering" with a state court decision. Rather, the state court procedure wholly precluded Mr. Silva from developing or presenting the evidence that is now before the District Court and by which Mr. Silva will be able to demonstrate the infirmities of his capital judgment. It is the denial of any state court procedure that has caused the District Court to grant the hearing.

There is no reason for this Court to grant interlocutory appeal.

III.

This matter will not be materially advanced by an interlocutory appeal

An interlocutory appeal will not materially advance this litigation in the District Court, and for this additional reason it should not be permitted. *U.S. v. Woodbury*, 263 F.2d 784 (9th Cir. 1959)(interlocutory appeals favored where, if decided in favor of appellant, the lawsuit would thereby be concluded).

The Temporary Emergency Court of Appeals has reviewed the circumstances under which it believes such permissive appeals should be permitted:

> . . . the four situations contemplated by the sponsoring Judicial Conference of the United States, and presumably by Congress, in adopting §1292(b) are summarized as follows (88 Harvard Law Review at 611, 612):

> In the hearings, four situations were identified where use of the interlocutory appeal procedure would be appropriate: (1) "cases where an (extended) accounting is necessary upon an adjudication of liability"; (2) "cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action"; (3) "cases involving third-party defendants where there would be no reason for going on if they could not be held liable"; and (4) "cases of transfer of causes when it is claimed that the transfer is not authorized by law (because the transferee court lacks jurisdiction of the parties)." Each of these situations is one where immediate appeal could avoid an unnecessary trial. Even though the Act is not in terms limited to such situations, there is no indication in these examples, or in any of the statutory materials, that the goals of alleviating hardship and supervising lower courts were intended to be considered under the Act. Trial court certification was not viewed as an invitation to the trial judge to "certify" difficult questions of general applicability to the courts of appeals. (Footnotes omitted.)

Lerner, 690 F.2d at 211-212. None of the enumerated circumstances can be said to exist here. There are but the two litigants in this matter, and regardless of the ultimate determination on this point they will invariably remain in the litigation. There is no "extended trial" that Warden Calderon will be able to avoid even in the event he should prevail here. At the last hearing, in discussing the possibility of an interlocutory appeal, the District Court indicated that, if the ruling

were overturned, further proceedings would still be necessary before it could rule on the petition.

Assuming this Court were to grant interlocutory review, the only issue presented here concerns the application of the Act to the peculiar procedural history of Mr. Silva's case. If this Court were to reverse the District Court, such a ruling would not be dispositive of the larger question of whether or not Mr. Silva is entitled to an evidentiary hearing. The District Court affirmed its prior decision granting an evidentiary hearing without deciding several of the various constitutional bases upon which Mr. Silva had argued that it would be error to deny the hearing, including *inter alia*, the application of the Ex Post Facto and Due Process provisions. Accordingly, should this Court conclude the order granting the hearing is otherwise invalid in light of the reasons given by the District Court, it would remain for the District Court to adjudicate the remaining objections Mr. Silva has lodged relative to application of the Act to his matter.[15]

Because there are significant constitutional issues which would be implicated by the denial of a hearing, an interlocutory appeal will not materially advance this litigation. As a consequence, this predicate for §1292(b) review is not satisfied.

Additionally, given that discovery has been concluded, and that the complete evidentiary record is already before the District Court without any need for receipt of any further evidence,

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[15] Of course, this Court might choose to entertain the constitutional objections that Mr. Silva raised below without affording the District Court the opportunity to do so. Such a procedure, if employed, would not only disrupt the normal course of judicial review but would also conflict the rule that constitutional questions should be avoided when possible, particularly in the context of an interlocutory appeal. *Yahr v. Resor*, 431 F.2d 690, 691 (4th Cir.), *cert. denied*, 401 U.S. 982 (1970).

there is no reason to believe that review by this Court at this juncture would materially advance the overall litigation in this matter.

The "hearing" that is to occur is simply submission on the written materials already before the District Court. There is to be no formal evidentiary hearing, simply briefing of the issues that are before the lower court. However, even if that were somehow perceived as a burden, it has been specifically noted that the potential burdens of litigation cannot alone justify an interlocutory appeal. *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981). Similarly, interlocutory review of evidentiary questions has previously met with disapproval from this Court. *Matter of Fischel*, 557 F.2d 209, 213 (9th Cir. 1977).

In contrast to the simple submission of the matter to the district court which will occur absent interlocutory review, should this Court grant interlocutory review and reverse the ruling granting the hearing, then it would be necessary for the litigants to determine which of the other materials could still be considered by the District Court in support of Mr. Silva's claims so that a decision could be rendered on the petition.[16] Accordingly, it is eminently plausible that rather than expedite the litigation in the lower court, interlocutory review would in fact ultimately accomplish the opposite. Not only would the litigants be faced with the additional time and burden of litigating these issues here (and as discussed below, litigating new issues in this Court

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16 This Court may wish to note that a variety of additional materials have been lodged with the District Court throughout the litigation in the District Court (which now spans six years). These materials include the pleadings and records from the previous habeas corpus proceedings (before the California Supreme Court as well as in the Superior Court), materials and records filed before the California Supreme Court while Mr. Silva's matter was on direct appeal, and various items and pleadings filed in the District Court relative to the various issues raised in the petition.

that were not raised before the lower court), but they would also be faced with the prospect that, if the lower court's order is disturbed, the only immediate result would be that additional proceedings would thereafter be necessary in the District Court. When contrasted against the present scenario (proceeding on a complete record as submitted to the District Court), Warden Calderon's request cannot be squared with §1292(b)'s requirement that interlocutory review materially advance the litigation.

Warden Calderon does not and cannot point to any reason this issue merits or requires review at this unusual juncture rather than after the District Court has given full consideration to the complete record and after a judgment has been entered. Warden Calderon has failed to show how an interlocutory appeal will materially advance this litigation, despite the fact that such a showing is a prerequisite to an appeal under §1292(b). *Fisons Limited v. U.S.*, 458 F.2d 1241 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972). His petition for permission to pursue an appeal in this manner should be denied.

IV.

This Matter does not present an Issue of First Impression

But Rather Merely Requires Application of Established Precepts of Statutory Construction

Warden Calderon argues that this matters merits interlocutory appeal since it presents an important issue that the District Courts are grappling with relative to the application of the new Act. However, the question that the District Court faced in this matter is one that courts face on a constant basis: when new legislation is enacted into law, courts must constantly decide whether it applies to any particular pending case or whether it is to be only to cases arising thereafter.

While important, this is in fact a rather mundane question on which there is much guidance in the case law. Warden Calderon's discontent over the District Court's decision does not convert the matter into such a novel issue that it cannot await post-judgment adjudication.

The District Court's approach and application of established principles of statutory construction further belies Warden Calderon's attempt to characterize this as a "novel" issue. The District Court recognized that even though the Act may be new, the law regarding its application is well established so that the decision here broke no new ground:

> This Court does not have to address the retroactivity of 28 U.S.C. §2254(e) because whether or not it applies, there is no substantive change to the standards governing the grant of evidentiary hearings. In other words, the amendment is a codification of pre-existing case law which was controlling case law when this Court originally granted the evidentiary hearing. Since the amendment effected no real change, whether it is applied to this case or not is of no consequence.

District Court's Order Denying Respondent's Motion to Vacate the Court's Prior Order Granting an Evidentiary Hearing, page 16, lines 13-20 (attached as Exhibit One to Warden Calderon's Petition for Permission to Appeal).

Thus, the order is based not merely upon the Act, but also upon pre-existing case law which also compels an evidentiary hearing under these circumstances. Whatever guidance this Court might be able to offer other courts by reviewing the Act will accordingly be diminished since, in this instance, the District Court's decision rests upon additional considerations beyond the Act.

V.

Warden Calderon raises objections here to the District Court's decision that were not presented to the District Court

Warden Calderon objects here to the District Court's order arguing here that the Act rewrote decades of habeas case law. This argument was never made to the District Court, and accordingly should not be permitted here, particularly in the context of an interlocutory appeal. In order to understand the record below, it is necessary to understand the way in which Warden Calderon brought this issue before the District Court.

The same day that President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, Warden Calderon forwarded a pleading entitled "Notice of New Legislation with Points and Authorities" to Mr. Silva's counsel. The document was received that same day by facsimile, and met with an immediate response and objection from Mr. Silva's counsel. Mr. Silva's counsel immediately advised Warden Calderon's counsel that to the extent the "Notice of New Legislation" sought any relief from the District Court, he believed that it was not in compliance with the District Court's Local Rules. The specific requirements set forth by the Local Rules were noted in that conversation.

In particular, the District Court's Local Rules require all motions be in writing,[17] that they

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17 Rule 7.4 of the Local Rules of the Central District of California states: "Unless otherwise provided by rule or order of the Court, no oral motions will be recognized and every motion shall be presented by written notice of motion. The notice of motion shall be filed with the Clerk and served on each of the parties . . . If mailed, the notice of motion shall be served not later than twenty-four (24) days before the Motion Day designated in the notice. If served personally, the notice of motion shall be served not later than twenty-one (21) days before the Motion Day designated in the notice. . . The Court may order a shorter time." Local Rule 7.4

state with particularity the relief sought, that they contain the authority upon which the moving party seeks such relief, and they be filed with 21 days advance notice or, if time does not permit, that an application be made for an order shortening time and the justification therefor be shown.

In light of the perceived failure of Warden Calderon's pleading to conform to any of these requirements, Mr. Silva's counsel noted that he would and did object to the filing if submitted in the proposed form. Warden Calderon's response was to prepare an otherwise identical pleading with the different caption "Opposition to Evidentiary Hearing with Points and Authorities." Except for the change in caption, in all material respects the pleadings appear identical. Accordingly, even the revised pleading did not state with particularly what relief was sought from the District Court, was not presented to the Court as a formal motion, and failed utterly to advance any particular theory or authority in support of Warden Calderon's general objection to the conduct of the scheduled evidentiary hearing.

The procedural deficiencies of Warden Calderon's "pleading" gave rise to irregularities in the procedural and substantive development of the record on this matter. Since there was no properly prepared or pled motion from Warden Calderon before the District Court seeking to vacate or modify the District Court's prior order granting an evidentiary hearing, when the District Court called for his response, Mr. Silva was compelled to brief and to oppose an amorphous issue. While it was clear that Warden Calderon was seeking to vacate the order granting Mr. Silva an evidentiary hearing; the grounds, the theory and the authority upon which

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further states that "No motion will be considered by the Court unless it meets the requirements of Local Rule 7."

Warden Calderon based his position were unarticulated. Even when he filed his written reply to Mr. Silva's request that the District Court sustain its prior grant of an evidentiary hearing, Warden Calderon never addressed the theory he now advances regarding the impact of the Act and the significance of its legislative history.

This alone is a reason for which this Court should deny such permissive appellate review. "As a general rule, an appellate court will not consider arguments which were not first raised before the district court, absent a showing of exceptional circumstances." *Federal Sav. and Loan Ins. Corp. v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990).[18]

If Warden Calderon is granted leave to appeal the District Court's decision, then this issue will be litigated before this Court without having been presented to or ruled upon by the District Court. Mr. Silva respectfully submits that this is not the objective of permissive interlocutory appeals brought under 28 U.S.C. §1292(b), and the petition for leave to file such an interlocutory appeal should accordingly be denied.

CONCLUSION

Warden Calderon's petition for leave to file an interlocutory appeal does not satisfy the standards which govern permissive appeals under 28 U.S.C. §1292(b). He has failed to

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18 In his petition to this Court, Warden Calderon, for the first time, advances the argument that the legislative history of this Act contradicts the interpretation given by the District Court. In addition to not having been presented to the District Court, this argument is advanced in great part without accompanying citations. Mr. Silva takes exception to both procedural deficiencies and he seeks an order from this Court directing those portions of the pleading be stricken from the record. In the alternative, Mr. Silva asks this Court direct that appropriate citations be provided to substantiate the asserted propositions.

demonstrate what controlling question of law exists that mandates immediate review; he has failed to demonstrate how the litigation in the District Court would be materially advanced thereby; and he has failed to demonstrate why this is an instance where this Court could afford other litigants guidance in the application of the new legislation at hand.

There can be no prejudice to Warden Calderon from a decision by this Court declining to grant permission to appeal this question at this juncture since his right seek review after conclusion of the District Court's proceedings will not be diminished thereby. *Balla v. Idaho State Board of Corrections*, 869 F.2d 461 (9th Cir. 1989). It is respectfully urged that this Honorable Court deny the Petition for Permission to File an Appeal in this matter.

Respectfully submitted,

Dated: May ___, 1997

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Phillip A. Treviño